

KENTUCKY PERSONNEL BOARD
MINUTES OF JUNE 18, 2012

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chairman Doug Sapp on June 18, 2012, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Wayne "Doug" Sapp, Chairman
Larry B. Gillis, Vice Chairman
David B. Stevens, Member
David F. Hutcheson, Jr., Member
Susan Gardner, Member
Tommy W. Chandler, Member
Donald W. "Don" Blevins, Member
Mark A. Sipek, Executive Director and Secretary
Boyce A. Crocker, General Counsel
Cynthia Perkins, Administrative Specialist

Board Personnel Absent:

Linda R. Morris, Administrative Section Supervisor

2. **READING OF THE MINUTES OF REGULAR MEETING HELD MAY 14, 2012**

The minutes of the last Board meeting had been previously circulated among the members. Chairman Sapp asked for additions or corrections. Mr. Hutcheson moved to approve the minutes, as submitted. Dr. Stevens seconded, and the motion carried 7-0. The Board members signed the minutes.

3. **EXECUTIVE DIRECTOR'S REPORT**

Chairman Sapp announced that it was Ms. Gardner's last meeting before retiring from her position with the Department of Financial Institutions.

Mr. Sipek, Mr. Crocker and some of the hearing officers attended the Kentucky Association of Administrative Adjudicators (KAAA) training that was held May 18, 2012. Mr. Sipek stated that it was a full day of training. One presentation dealt with writing orders, which was helpful. One presentation dealt with *pro se* parties which is an issue that happens quite often at the Board. Mr. Sipek stated that staff and hearing officers remain certified.

In addition, Mr. Sipek and Mr. Crocker both attended the University of Kentucky Employment Law conference which is held every two years. There was a presentation by the Hon. Dinah Bevington of the Personnel Cabinet and an appearance by the Hon. Whitney Meagher.

On Friday, Mr. Sipek, Mr. Crocker and some of the hearing officers will be attending hearing officer's training at the Attorney General's office.

Mr. Sipek stated that the Hon. Steve Bolton will not be renewing his contract as a hearing officer. He has accepted a position as an Administrative Law Judge with the Workers' Compensation Board. Mr. Bolton has been a hearing officer with the Board for a long time. Since the other nine hearing officers have renewed their contracts; and with the budget as it is, Mr. Sipek stated the funds will be distributed among nine instead of adding another hearing officer.

The Franklin Circuit Court's Opinion and Order affirmed the Board's Final Order in *Beverly Adams vs. Cabinet for Health and Family Services*, 11-CI-975. However, this case has been appealed to the Court of Appeals.

Mr. Crocker presented oral argument at the Kentucky Supreme Court in the *Wanda Faye Wade vs. Finance Cabinet* appeal on June 14, 2012. The issues are whether or not there was a waiver of the pre-termination hearing and whether or not an agency can unilaterally reinstate an employee while an appeal is pending. Mr. Sipek stated that it may be months before the Board receives an opinion.

Mr. Sipek stated, on behalf of the staff, that Ms. Gardner will be missed. Mr. Sipek stated he hopes Ms. Gardner will enjoy her retirement. Mr. Sipek advised that discussion of filling the vacancy will be moved to the end of the agenda.

At the conclusion of Mr. Sipek's report, Chairman Sapp called for the Personnel Cabinet's report.

4. PERSONNEL CABINET'S REPORT

The Hon. Whitney Meagher came forward to present the Personnel Cabinet's report.

Neither Ms. Bevington nor Ms. Mary Elizabeth Harrod, Director of the Division of Employee Management, was available to attend the Board meeting to present the report concerning annual evaluation rewards; however, they will present it at the next meeting.

Ms. Meagher stated that 101 KAR 2:140, Workers' Compensation regulation, will become effective in early July, 2012. Once it has become effective a memo will be issued by the Personnel Cabinet to all the agencies notifying them of any changes.

Ms. Meagher reiterated that the June 30th payday will be deferred until Monday, July 2, 2012. Banks have been notified about the deferral and have been very helpful with the process.

In conclusion, Ms. Meagher stated that June is "Safety Awareness Month." On June 19, 2012, the Employee Safety Advisory Council will hold a ceremony to recognize state Cabinets and offices that have lost no time due to work related illness or injury.

Upon conclusion of the Personnel Cabinet's report, Chairman Sapp called the parties forward for oral argument.

5. ORAL ARGUMENTS

A. Rachel Bowling v. Cabinet for Health and Family Services
(Deferred to July)

Chairman Sapp advised that this matter will be moved to the next Board meeting due to counsel for Appellee having a family emergency.

B. Holly Jackson v. Cabinet for Health and Family Services

Present for oral argument were the Appellant, Holly Jackson; counsel for Appellant, Hon. Richard Walls; and counsel for Appellee, the Hon. Jennifer Wolsing. After presenting oral arguments, the parties answered questions from the Board.

C. Trudy Koenig v. Public Protection Cabinet (Kentucky Horse Racing Comm.)

Present for oral argument were the Appellant, Trudy Koenig; counsel for Appellant, Hon. Philip Kimball; and counsel for Appellee, the Hon. Gordon Slone. After presenting oral arguments, the parties answered questions from the Board.

6. INVESTIGATIONS

A. **Dept. of Juvenile Justice, Lincoln Village Youth Detention Center
Request by Thomas Brandenburg, Former Facilities Superintendent
(Tabled from May meeting)**

Mr. Brandenburg was present and the Hon. LaDonna Koebel, Assistant General Counsel for the Department of Juvenile Justice (DJJ), was present.

Mr. Sipek stated that since the last meeting, the Board has received a copy of Mr. Brandenburg's personnel file from both the Personnel Cabinet and DJJ. Mr. Sipek advised that a copy of the memorandum from Ms. Grady was not in either file. However, Mr. Sipek was advised by DJJ it was perhaps located in a disciplinary file.

Mr. Brandenburg stated that he was harassed by Ms. Grady through numerous write-ups and falsehoods. He was denied any process to counter the accusations, so he resigned his position in December 2010. Mr. Brandenburg explained that prior to Ms. Grady taking over as Acting Superintendent he had an exemplary record.

Ms. Koebel stated that Mr. Brandenburg left DJJ in December 2010. Mr. Brandenburg had twelve months to appeal any action, and he is beyond the statute of limitations. Further, Ms. Koebel asked whether or not the Board has authority or jurisdiction over this matter.

Mr. Blevins wanted to know why there are separate files. Ms. Koebel explained that DJJ keeps disciplinary files separate from personnel files. It does not become an official part of the personnel file with either the agency or the Personnel Cabinet, unless followed by disciplinary action.

Mr. Gillis asked Mr. Brandenburg how he received a copy of the memorandum. Mr. Brandenburg explained that he did not receive it when he first requested a copy of his personnel file. It was after he filed a freedom of information request with Ms. Nancy Birdsong that he received a copy of the memorandum prepared by Ms. Grady.

Mr. Gillis asked Ms. Koebel what would prevent a state agency or any other person from getting a copy of the unofficial disciplinary file after filing a freedom of information request. Ms. Koebel stated that it would depend on whether the person or agency asked for a copy of the personnel file or whether they asked for "all" files.

Mr. Brandenburg stated he would have appealed sooner if he had known of the existence of the memo in order to defend himself of falsehoods contained in the memo. Mr. Brandenburg first became aware of its existence in May 2012. Mr. Crocker stated that it appeared the memorandum was prepared for litigation purposes.

Mr. Gillis stated that an employee should be given time to respond to information placed in his file, if the employee is made aware of it.

Mr. Crocker stated that one year would be the statute of limitation, at best to any appeal.

Judge Chandler explained to Mr. Brandenburg that the Personnel Board may not have authority to investigate and that there may not be any relief. Judge Chandler stated that he wants to confirm the Board has jurisdiction and whether or not this matter is subject to a statute of limitations.

Mr. Brandenburg stated he was not afforded an exit interview after his resignation. Mr. Blevins stated that Mr. Brandenburg should have been afforded an exit interview and also counseled at that time that he had certain appeal rights. Ms. Koebel stated in response that Mr. Brandenburg voluntarily resigned, so there would be no exit interview. Judge Chandler stated that Mr. Brandenburg was asking the Board to investigate the agency's wrongdoing, not his employment or whether he filed an appeal. Judge Chandler stated the question is whether Mr. Brandenburg has the right to request an investigation as a citizen of the Commonwealth and whether the Board has authority to initiate an investigation. Mr. Sipek stated that KRS 18A.075(2) allows a citizen to request an investigation. Mr. Blevins stated that it should be made clear to Mr. Brandenburg that there is no relief for him if the Board were to investigate. Mr. Brandenburg stated that he understood. Mr. Brandenburg stated he wanted his name cleared and be able to respond to the falsehoods made in the memorandum by Ms. Grady so that he can get gainful employment.

Chairman Sapp asked Ms. Koebel why the memorandum was prepared, as it was not placed in Mr. Brandenburg's personnel file. Ms. Koebel stated the Agency was documenting the problems they had with Mr. Brandenburg, but cannot speak for the person who actually prepared it. Mr. Sipek stated that the first paragraph of the memorandum states "Although Thomas Brandenburg resigned his position of Maintenance Superintendent I for Lincoln Village YD/RJDC effective 12/13/10, this Major Corrective Action request is being submitted as a matter of record, at the direction of Division Directory Bob Hayter," which gives the Board some direction as to why it was prepared. Ms. Koebel stated that Mr. Hayter is currently on military leave and will be for a significant time.

Mr. Brandenburg stated that the memo was prepared a month after he resigned and, therefore, he did not get a chance to refute the allegations made by Ms. Grady. Judge Chandler asked if the memo was prepared within the timeframe for Mr. Brandenburg to have filed an appeal. Ms. Koebel stated it was. Mr. Gillis asked when Mr. Brandenburg first became aware of the memorandum. Mr. Brandenburg stated that it was in May 2012. Judge Chandler asked Mr. Brandenburg if he knows whether or not anyone else received a copy of the memorandum. Mr. Brandenburg stated he did not know the answer to that, but he is having a difficult time getting employment and he felt he was being "blackballed." Judge Chandler stated that an investigation would reveal whether or not what Mr. Brandenburg was stating was true.

Mr. Blevins stated that a key issue is whether Mr. Brandenburg can file an appeal, since he only learned of the existence of the memorandum for two months. Mr. Blevins felt the Board should be fair to both parties in this matter.

Judge Chandler moved to defer this matter to the next Board meeting. Mr. Blevins seconded. Chairman Sapp stated that the motion to defer will be restated to include: 1) To allow individual research by the Board; and 2) for staff to research what appeal rights may be afforded to Mr. Brandenburg as a result of the memorandum that involves him personally. The motion carried 7-0.

Chairman Sapp advised Ms. Koebel and Mr. Brandenburg that they may attend the July Board meeting.

B. Referral of Personnel Matters in the Auditor's Report on the Kentucky Department of Agriculture (Tabled from May meeting)

Mr. Sipek advised that he is awaiting a response from the Department of Agriculture, but should have it in time for the July Board meeting. Mr. Sipek stated that, at the request of Mr. Gillis, it would also be a good time to revisit the investigation by Anonymous. Both items will be on the July agenda.

Mr. Gillis made a motion to table this matter to the July Board meeting. Mr. Blevins seconded and the motion carried 7-0.

7. CLOSED SESSION

Mr. Hutcheson moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications. Mr. Gillis seconded. Chairman Sapp stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 7-0. (11:15 a.m.)

Mr. Gillis moved to return to open session. Dr. Stevens seconded and the motion carried 7-0. (12:20 p.m.)

8. CASES TO BE DECIDED

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

A. Rachel Bowling v. Cabinet for Health and Family Services

Mr. Hutcheson moved to defer this matter to the July Board meeting as counsel for Appellee had a family emergency and was unable to attend the June meeting. Dr. Stevens seconded and the motion carried 7-0.

B. Holly Jackson v. Cabinet for Health and Family Services

Mr. Blevins moved to note Appellee's exceptions and oral arguments, and to defer this matter to the next Board meeting. Mr. Hutcheson seconded and the motion carried 7-0.

C. Trudy Koenig v. Public Protection Cabinet (Kentucky Horse Racing Comm.)

Dr. Stevens moved to note Appellant's exceptions, Appellee's response and oral arguments, and to accept the recommended order dismissing the appeal. Ms. Gardner seconded and the motion carried 7-0.

D. Laura Moreno v. Cabinet for Health and Family Services

Mr. Hutcheson moved to note Appellee's exceptions, Appellant's response and oral argument, and to accept the Final Order Altering the recommended order and dismissing the appeal, as attached to the minutes. Mr. Gillis seconded and the motion carried 7-0.

E. Robert Reynolds v. Transportation Cabinet and Ernie W. Burton
Deferred from May meeting

Mr. Blevins moved to note Appellant's exceptions, Appellee's response and oral argument, and to accept the Final Order Altering the recommended order and sustaining the appeal to the extent that the promotion of Intervenor Burton be voided *ab initio* and the process to fill the position of Highway Equipment Operator IV be repeated in accordance with KRS 18A.0751(4)(f) and 101 KAR 1:400, as attached to the minutes. Mr. Hutcheson seconded and the motion carried 7-0.

F. Kimber Craddock v. Justice and Public Safety Cabinet (Corrections)

Ms. Gardner moved to note Appellant's exceptions, Appellee's response and to accept the recommended order dismissing the appeal. Judge Chandler seconded and the motion carried 7-0.

G. Karen Hazelwood v. Cabinet for Health and Family Services

Mr. Hutcheson moved to note Appellee's exceptions, and to accept the recommended order sustaining the appeal to the extent of rescinding the resignation and awarding back pay. Dr. Stevens seconded and the motion carried 5-2, with Chairman Sapp and Mr. Gillis opposing.

H. Carrie Minor v. Cabinet for Health and Family Services

Dr. Stevens moved to note Appellee's exceptions, Appellant's response and to accept the recommended order sustaining the appeal. Ms. Gardner seconded and the motion carried 7-0.

I. Robert Dungan v. Transportation Cabinet

Judge Chandler moved to accept the recommended order dismissing the appeal. Mr. Gillis seconded and the motion carried 7-0.

J. Kurt Fogle v. Cabinet for Health and Family Services

Mr. Gillis moved to accept the recommended order dismissing the appeal. Mr. Hutcheson seconded and the motion carried 7-0.

K. ~~Charles Lickteig v. Justice and Public Safety Cabinet (Corrections)~~
Moved to July

L. Richard Meade v. Cabinet for Health and Family Services

Judge Chandler moved to note Appellee's motion for extension to file response to exceptions as moot and to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 7-0.

M. Ron Smith v. Justice and Public Safety Cabinet (Corrections)

Mr. Gillis moved to accept the recommended order dismissing the appeal. Mr. Hutcheson seconded and the motion carried 7-0.

Show Cause Orders – No Response Filed – Appeals Dismissed

The following case had a show cause order entered by the hearing officer recommending that the appeal be dismissed for failure to timely prosecute unless a statement was filed by the Appellant stating sufficient cause to excuse their failure to appear at the scheduled hearing. There was no response submitted by the Appellant to the show cause order.

N. Raymond Hudgins, Jr. v. Justice and Public Safety Cabinet (Corrections)

Dr. Stevens moved to find that the Appellant had not responded to the show cause order and that the recommended order be accepted dismissing the appeal for failure to timely prosecute the appeal. Mr. Gillis seconded and the motion carried 7-0.

9. WITHDRAWALS

Judge Chandler moved to consider the following withdrawals of appeals *en bloc* and to accept the withdrawals and dismiss the appeals. Ms. Gardner seconded and the motion carried 7-0.

- A. Virginia Carpenter v. Personnel Cabinet and Tourism, Arts and Heritage Cabinet (Parks)
- B. Heath Higdon v. Department of Agriculture
- C. Clay Leonard Kik v. Personnel Cabinet
- D. Michelle Peek v. Cabinet for Health and Family Services
- E. Joe Ramones III v. Public Protection Cabinet
- F. Lisa Stander v. Cabinet for Health and Family Services

10. SETTLEMENTS

Ms. Gardner moved to accept the following settlements *en bloc*, as submitted by the parties, and to sustain the appeal to the extent set forth in the settlement. Mr. Gillis seconded and the motion carried 7-0.

- A. Dana Abbot v. Cabinet for Health and Family Service
- B. Elizabeth Daugherty v. Cabinet for Health and Family Services
- C. Karen Edens v. Cabinet for Health and Family Services
- D. Donna Sullivan v. Cabinet for Health and Family Services
- E. Kimani Ealom v. Cabinet for Health and Family Services
- F. Tracy Nantz v. Justice and Public Safety Cabinet (Corrections) (mediated)

11. **OTHER**

Chairman Sapp advised that the information requested from the Department of Agriculture has been received and copied to the Board members to be discussed at the July 2012 meeting.

Mr. Sipek stated that pursuant to statute the Board has the task of choosing the new employee Board Member.

Mr. Crocker stated that the Personnel Cabinet will issue a memorandum to all merit employees within fifteen days of the vacancy. Applications must be received by the Board within ten days of the Cabinet's notification. Mr. Gillis, Mr. Blevins, and Mr. Sipek volunteered to be the screening committee. Judge Chandler moved to narrow the applications to five résumés to appear before the full Board in August 2012. Mr. Hutcheson seconded and the motion carried 7-0.

Ms. Gardner thanked everyone and stated she had felt welcome on the Board from the first meeting.

Chairman Sapp asked if there were any other matters to be discussed. There being no further business, Mr. Hutcheson moved to adjourn. Mr. Gillis seconded and the motion carried 7-0. (12:35 p.m.)

Wayne D. Sapp, Chairman

Larry B. Gillis, Vice Chairman

David B. Stevens, Member

David F. Hutcheson, Jr., Member

Susan Gardner, Member

Tommy Chandler, Member

Donald W. Blevins, Member